that although it would, as a matter of practice, be useful to support such an application by an affidavit to explain the grounds of objection relied on, yet there is no such legal requirement in our Rules of the Supreme Court which only require an application to set aside proceedings for an irregularity to be made by summons or motion and that the grounds of objection must be stated in the summons or notice of motion, as the case may be.

Having regard to all the circumstances of this case I did not consider that any drastic action such as setting aside the writ of summons should be allowed thereby forcing the plaintiff to start fresh proceedings *ab initio*. But as I was satisfied that it was clear in this case that the wrong person had been served with process, I therefore, under Order 70 rule 1 of the Rules of the Supreme Court, 1957, and for the reasons stated above, ordered that the service of the writ of summons in this case on the applicant be set aside and that the costs of and incidental to the application be taxed and paid by the plaintiff to the said applicant.

Order accordingly.

Solicitors: *Jag-Jit Singh & Co.; Muttiah & Co.*

OOI CHIN SENG v. PUBLIC PROSECUTOR & ANOR.

[A.Cr.J. (Hashim Yeop A. Sani J.) November 1, 1978]
[Ipoh — Criminal Appeals Nos. 93 and 94 of 1976]

Fisheries — Appeal against forfeiture of vessels — Operating trawl net with engine 120 h.p boat within 12 mls. of coast — Whether magistrate erred in law in not holding an enquiry under section 407, Criminal Procedure Code — Fisheries Act, 1963, ss. 13, 15(1) — Fisheries, Maritime Regulations, 1967, regs. 3(b), 4(4), clause 1(a) of the Fifth Schedule — Criminal Procedure Code (F.M.S. Cap. 6), s. 407.

Criminal Law and Procedure — General provisions of s. 407, Criminal Procedure Code overridden by s. 15(1) of the Fisheries Act, 1963.

The two appellants in this case were the owners of motor boats which were forfeited by an order of the lower court. The accused persons (not the appellants) operating these boats had pleaded guilty to charges relating to "operating trawl net used with engine 120 h.p. boat" in waters within 12 miles off the coast of Perak. This was in contravention of the provisions of clause 1(a) of the Fifth Schedule made under regulation 4(4) of the Fisheries (Maritime) Regulation 1967 which provides that trawl nets shall be used only in waters beyond 12 miles limit of the coast. The appellants contended that the learned magistrate erred in law in summarily ordering the forfeiture of the boats without holding an enquiry under section 407 of the Criminal Procedure Code.

Held, dismissing both appeals: the general provisions of section 407, Criminal Procedure Code were overridden by the specific provisions of section 15(1) of the Fisheries Act 1963 with regard to disposal of property and in any case to have an inquiry would be meaningless for the Court must give effect to the express words of section 15(1) of the Act.

Cases referred to:-

(1) *Chung Khiaw Bank Ltd.* v. *Public Prosecutor* [1968] 2 M.L.J. 196.

(2) *Ong See Ke* v. *Public Prosecutor* [1976] 2 M.L.J. 146.

(3) *Public Prosecutor* v. *Lee Chin Chai* [1974] 2 M.L.J. 174.

(4) *Public Prosecutor* v. *Lee Chin Chai & Ors.* [1974] 2 M.L.J. 205.

(5) *Juk De Sa* v. *Public Prosecutor* [1975] 1 M.L.J. 283.

CRIMINAL APPEALS.

Yeap Ghim Guan for the appellants.

Lee Lim Huat (Deputy Public Prosecutor) for the respondent.

Hashim Yeop A. Sani J.: The two appellants namely, Ooi Chin Seng in respect of Parit Buntar Arrest Case PB(A) 96 of 1973 and Tan Sock Lan in respect of Parit Buntar Arrest Case PB(A) 194 of 1973 are the owners of motor boats registration No. PK 2781F and PK 2192F respectively, which form the subject matters in the two arrest cases referred to above. In both the magistrate's cases referred to the accused persons (who were not the appellants) pleaded guilty to charges relating to contravention of the provisions of clause 1(a) of the Fifth Schedule to regulation 4(4) of the Fisheries (Maritime) Regulations 1967 and punishable under section 13 of the Fisheries Act 1963. In both the cases the charges respectively were that the accused persons were each found "operating trawl net used with engine 120 h.p. boat" in waters 5½ miles off the coast of Kuala Gula, Perak, in the case of PB(A) 96 of 1973 and in waters 4.01 miles off the coast of Tanjong Piandang, Perak, in the case of PB(A) 104 of 1973, in contravention of the provisions of clause 1(a) of the Fifth Schedule made under regulation 4(4) of the Fisheries (Maritime) Regulation 1967 in that the said trawl nets shall be used only in waters beyond 12 miles limit of the coast.

The two appellants in this appeal were dissatisfied with the order of forfeiture of the vessels made by the learned magistrate and appealed against the forfeiture. Counsel for appellants argued solely on the following points:—

(a) That the learned magistrate erred in law in summarily ordering the forfeiture of the boats without holding an inquiry under section 407 of the Criminal Procedure Code.

(b) That the learned magistrate erred in law in not allowing the appellants to be heard.

(c) That the learned magistrate erred in law in holding that he had "no other choice" under the Act but to order forfeiture of the boats.

Grounds (a) and (b) can be dealt with together and ground (c) is one of construction.

It is the contention of the appellants that the two cases referred to in which the learned magistrate ordered forfeiture of the vessels did not fall under section 15 of the Fisheries Act, 1963 and therefore there was *discretion* as to forfeiture. As such the provision of section 407 of the Criminal Procedure Code should have been applied by the magistrate by holding an inquiry in which the owners of the vessels should be heard before any order of forfeiture could lawfully be made. In *Chung Khiaw Bank Ltd.* v. *Public Prosecutor*[1] the Federal Court in a criminal reference held that in respect of forfeiture of a motor vehicle seized under section 92 of the Road Traffic Ordinance, 1958, the court has discretion under section 92(4) of the Ordinance to forfeit the vehicle or to order the release of the vehicle and that the court should hold an inquiry under section 407(ii) of the Criminal Procedure Code and at such inquiry the

true legal owner of the vehicle has a right to be heard. Section 92(4) of the Road Traffic Ordinance clearly provides that an order for the forfeiture or for the release of the motor vehicle seized shall be made by the court before which the prosecution has been held and that an order for the forfeiture of such vehicle may be made if it is proved to the satisfaction of the court that an offence has been committed and that the vehicle was the subject matter of the offence, notwithstanding that no person may have been convicted of such an offence. The operative words in section 92(4) with regard to forfeiture are "an order for the forfeiture of such vehicle *may* be made if it is proved to the satisfaction of the court that an offence against that section has been committed." The forfeiture provision there is clearly distinguishable from the forfeiture provision of the Fisheries Act, 1963 or as was referred to in the *Chung Khiaw Bank* case the forfeiture provisions of the Customs Ordinance (now repealed) and the Excise Act, 1961.

I dealt with the construction of section 15(1) of the Fisheries Act, 1963 in *Ong See Ke* v. *Public Prosecutor*[2] where at page 147 of the judgment the following appears:

"It is the contention of the counsel for the appellant that since a licence was in force in respect of the trawl net then the use of the net cannot be said to be 'prohibited'. This argument has no merit. It is to be noted that the licence issued was subject to a number of conditions and one of these conditions is that the area for the operation of the trawl net authorised is the area beyond 7 miles from the coast of the State of Perak. In other words the licence is valid only for trawl fishing outside the 7 miles off the coast but not within the 7 miles and using a trawl net within the 7 miles is therefore unauthorised or prohibited. Furthermore it is also clearly worded in section 13(1) of the Fisheries Act, 1963, which provides for the penalty for breach of provisions of the Act and regulations and rules thereunder where it states that any person who does any act contrary to, or fails to comply with, the provisions of this Act or any regulations or rules made thereunder shall be guilty of an offence. Regulation 4(6) of the Fisheries (Maritime) Regulations, 1967 as amended in 1970 (vide P.U.(A) 56/70) provides clearly that a contravention of any of the conditions of the licence shall be deemed to be an act contrary to the regulations and by virtue of section 13(1) of the Act an offence under the Act. In this case the statutory conditions attached are as in the Fifth Schedule (see regulation 4(4))."

Counsel for the appellants relied on the Federal Court case *Public Prosecutor* v. *Lee Chin Chai*[3] which was a reference on the same section by the Public Prosecutor as a result of case *Public Prosecutor* v. *Lee Chin Chai & Ors.*[4] In fact the question raised in that reference before the Federal Court was a narrow one, that is whether a vessel in which fishing appliances are found contrary to regulation 3(b) of the Fisheries (Maritime) Regulations, 1967, is a thing in respect of which an offence has been committed contrary to the provisions of the Act or any regulations or rules made thereunder, and thereby liable to seizure under section 14(1) of the Fisheries Act, 1963 (as amended by Act A152 of 1972) and consequently liable to forfeiture under section 15(1) of the same Act. The answer to that was given in the negative by the Federal Court. Both these cases cannot be applied to the present appeal because in the instant case the offence was for operating trawl nets outside the prescribed area in the licence whereas in *Public Prosecutor* v. *Lee Chin Choi, supra,* the offence was for possession of fishing appliances without a licence.

The case of *Juk De Sa* v. *Public Prosecutor*[5] is not also applicable here because there the question of section 407 of the Criminal Procedure Code was not raised. Section 407 of the Criminal Procedure Code is a general provision relating to the order for disposal of property regarding which an offence has been committed and provides that during or at the conclusion of any inquiry or trial in any criminal court the court may make such order as it thinks fit for the custody or disposal of any property or document whatsoever produced before it regarding which any offence appears to have been committed or which has been used for the commission of any offence. But the words of section 15(1) of the Fisheries Act, 1963 are so clear that an order for forfeiture *shall* be made if it is proved to the satisfaction of the court that the offence committed is either for using any net, instrument, fishing material or appliance which is "prohibited" or the offence is for doing or carrying on an act without a licence or permit required by that Act or any regulations or rules made thereunder provided that the "thing" was the subject matter of or was used in the commission of the offence. There was no doubt also that the general provisions of section 407 of the Criminal Procedure Code are overridden by the specific provision of section 15(1) of the Fisheries Act, 1963 with regard to disposal of property and that to have an inquiry under section 407 of the Criminal Procedure Code would in any case be meaningless for the court must give effect to the express words of section 15(1) of the Fisheries Act, 1963.

For the above reasons the appeal is dismissed.

Appeals dismissed.

Solicitors: *Yeap & Co.*

LENG JOO KONG v. CHIA YOON YEN

[A.C.J. (Abdul Razak J.) November 27, 1978]

[Kuantan — Originating Notice of Motion No. 3 of 1978]

Employment — Work on rest days — Whether employee entitled to claim wages — Weekly Holidays Ordinance, 1950, s. 6(i) — Employment Ordinance, 1955, ss. 58, 59(1), 60(3).

This was an appeal against the decision of the Commissioner for Labour disallowing the appellant wages on work done on rest days and entering judgment for the employer. The appellant in this case was a foreman in a motor workshop. He was required by the respondent/employer to work seven days a week. The appellant started work in October 1975 and was paid a sum of $240 per month. On February 1, 1976 he was given an extra $110 per month until he was dismissed. He therefore claimed rest day pay for 88 days at $13.46 per day amounting to $1,184.48 from July 1, 1975 to March 11, 1977.

Held, allowing the appeal: the appellant earned between $240 a month to $350 which brought him within the ambit of section 60 of the Employment Ordinance entitling him to claim wages on rest days.

ORIGINATING NOTICE OF MOTION.

S. Sivasubramanian for the appellant.

Respondent in person.

Abdul Razak J.: This is an appeal against the decision of the Commissioner for Labour wherein he disallowed the appellant wages on work done on rest